Jurisdictional Statement

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

JIM WALL, III, WILLIAM GREGORY WALL,
AND DANNY RUSSELL,
Appellants,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

(1) Whether the Florida Drug Trafficking Law, which upon conviction imposes mandatory minimum sentences without parole, and which permits a sentence reduction only if the defendant "provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals", is unconstitutional as a violation of the fifth amendment privilege against self-incrimination.

(2) Whether the Florida Drug Trafficking Law, which upon conviction requires the court to impose a mandatory minimum sentence without parole unless the state attorney, in his unreviewable discretion, moves for a sentence reduction, is unconstitutional as a violation of the due process clause of the fourteenth amendment.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

Appellants were appellees in the Florida Supreme Court. Their case was consolidated with a number of others raising the same issues. The Florida Supreme Court rendered two decisions, which in the aggregate disposed of Appellants' case: *State v. Benitez*, 395

So. 2d 514 (Fla. 1981); and *State v. Yu*, 400 So. 2d 762 (Fla. 1981). The opinion in *State v. Benitez* disposed of the issues raised in this appeal. Both decisions are reprinted in the appendix hereto.

JURISDICTION

This case originated as a criminal prosecution against Appellants in the Circuit Court for Escambia County, Florida, charging a violation of Section 893.135 of the Florida Statutes (1979), known as the Drug Trafficking Law. Appellants' motion to dismiss, based *inter alia* on the constitutional issues raised herein, was granted by the trial court. The State appealed to the Florida Supreme Court which reversed the trial court's order in a final opinion dated May 8, 1981. Appellants' timely motion for rehearing was denied on July 28, 1981. Notice of Appeal to this Court was filed in the Florida Supreme Court on August 17, 1981. Appellate jurisdiction is conferred on this Court by 28 U.S.C. § 1257(2).

The decision of the Florida Supreme Court upheld the Florida Drug Trafficking Law over federal constitutional attack and is the final decision of the highest court in Florida. The federal issues raised herein have been finally decided against Appellants and all others in the state. The decision of the Florida Supreme Court reversed the trial court's order dismissing the information, however, and a trial on the merits therefore remains.

A trial on the merits and imposition of sentence is normally required for a judgment to be sufficiently final to invoke this Court's appellate jurisdiction. This rule was most recently applied in *Flynt v. Ohio*, ___ U.S. ___, 101 S. Ct. 1958, 68 L. Ed. 2d 489 (1981), dis-

missing jurisdiction of petitioner's interlocutory claim that he was the victim of selective prosecution. As the *Flynt* decision noted, however, numerous instances have occurred where the Court has departed from the finality rule. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975), surveyed these decisions and grouped them into four categories of exceptions. As argued below, this appeal falls within both the third and fourth exceptions recognied in *Cox Broadcasting.*

Appellants contend that the Florida Drug Trafficking Law violates the privilege against self-incrimination. The Law imposes long mandatory sentences without possibility of parole upon conviction. The defendant may avoid such sentences, however, if he provides "substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." A defendant who has been tried on the merits and convicted, therefore, faces the coercive choice between cooperation with the prosecutor or a long prison sentence. Further, as a practical matter, such a defendant may not refuse cooperation and pursue appellate vindication of the privilege without fear of adverse consequences should his appeal be unsuccessful. Under the Drug Trafficking Law no sentencing reduction may occur unless the prosecutor, in his complete discretion, moves the court for a reduction. A defendant may certainly apprehend that no such motion will be forthcoming if he pursues an appeal rather than cooperating immediately. More importantly, the opportunity of cooperation in the identification and prosecution of accomplices would not survive the period of years necessary to complete the appellate process. Thus, the decision of noncooperation may not be revisited if the appellate outcome is adverse to the defendant.

This interrelationship between the statutory scheme and the issue of the applicability of the privilege demonstrates that *unless* this Court decides the constitutional issue in the present posture these Appellants, and many other unidentified defendants, may be forced to waive their privilege against self-incrimination.

The Court held in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 86 S. Ct. 194, 15 L. Ed. 2d 165 (1965), that appellate review of self-incrimination claims should not be deferred until after those asserting the privilege faced the coercive choice between waiver and *possible criminal prosecution.*

The SACB had ordered petitioners to register with it as members of the Communist Party. Petitioners sought review of the order in the court of appeals, attacking it on self-incrimination grounds. The court of appeals held the self-incrimination issue would not be ripe for appeal until petitioners refused to register and were criminally prosecuted for such failure. This Court rejected that argument and held the orders to register were sufficiently final for purposes of entertaining the self-incrimination claim:

> Petitioners must either register without a decision on the merits of their privilege claims, or fail to register and risk onerous and rapidly mounting penalties while awaiting the Government's pleasure whether to initiate a prosecution against them. To ask, in these circumstances, that petitioners await such a prosecution for an adjudication of their self-incrimination claims is, in effect, to contend that they should be denied the protection of the Fifth Amendment privilege *intended to relieve claimants of the necessity of making a choice between incriminating themselves and risking serious*

punishments for refusing to do so. [Emphasis added.]

382 U.S. at 75-76.

It is this vital point which distinguishes this appeal from *Flynt v. Ohio, supra,* and others of a similar nature. If the Court delays appellate review until after conviction and sentence then all accuseds must face the coercive dilemma between self-incrimination and serious punishment. The *only* opportunity which Appellants have to seek federal vindication of their claimed privilege without facing the coercive choice is this appeal.

Assuming *Albertson v. Subversive Activities Control Board* correctly states the law, then this appeal fits within the terms of either the third or fourth exceptions described in *Cox Broadcasting v. Cohn.* The third exception was stated as, "if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." 420 U.S. at 481. If Appellants in this case were to prevail on the merits at trial the federal issues would be mooted because of the acquittal. If Appellants were to lose on the merits and be convicted, the effect of the Florida Drug Trafficking Law would coerce cooperation and deter appellate vindication of the privilege. This reality was explicitly recognized in *Albertson v. Subversive Activities Control Board, supra.* This case therefore falls within the third exception.

The fourth exception in *Cox Broadcasting Corp. v. Cohn* was where the issue has been finally decided in the state courts, reversal of the state court on the federal issue would be dispositive of that cause of action, and a

refusal to immediately review "might seriously erode federal policy". 420 U.S. at 482-483. Deferring appellate review until a prosecution under the Drug Trafficking Law results in a conviction and sentence, followed by appeal in the Florida courts, will cause a wholesale waiver of the claimed privilege against self-incrimination by those defendants coerced by the sentencing structure of the statute. Further, Appellants have been charged under the law and this is the *only opportunity* they will have to protect their claimed privilege before they are confronted with the coercive choice which the Court recognized in *Albertson* should not be required as a condition of "finality". Refusal to immediately review, therefore, not only "might seriously erode federal policy" but would certainly do so if, in fact, the Florida law violates the privilege. Since the other requirements of the fourth exception are clearly met, this appeal falls within its terms.

Cox Broadcasting Corp. v. Cohn, like the present appeal, dealt with review of a state supreme court decision upholding on pre-trial motion the constitutionality of a state law. A trial on the merits remained, in which appellant could have prevailed, thus mooting the federal issue. Nevertheless, this Court took jurisdiction because the federal issue had been finally determined by the highest state court, and a decision on the federal issue would be dispositive of the cause of action. Further, permitting the Georgia Supreme Court decision to stand would "leave unanswered . . . an important question of freedom of the press" under "a statute the constitutionality of which is in serious doubt . . . ." 420 U.S. at 485-486.

As argued *infra* under *The Questions Presented Are Substantial,* the constitutionality of the Florida Drug

Trafficking Law is in serious doubt. The merits of Appellants' claim should to some degree affect the jurisdictional decision. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 486, footnote 13. Therefore, unless the Court perceives a principled reason for limiting *Cox Broadcasting* to appeals presenting freedom of the press issues, this appeal is governed by that decision.

Other decisions of this Court have entertained appeals, although a trial on the merits remained, where necessary to protect federal interests other than freedom of the press. In the civil context, these decisions are cited and discussed in *Cox Broadcasting Corp. v. Cohn.* Two important criminal decisions not mentioned there are *Abney v. United States*, 431 U.S. 651, 660-661, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977) ("[T]he rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence . . . ."); and *Helstoski v. Meanor*, 442 U.S. 500, 99 S. Ct. 2445, 61 L. Ed. 2d 30 (1979) (mandamus improper appellate remedy but defendant could have appealed from trial court's rejection of his motion to dismiss based on the Speech and Debate Clause since trial on the merits would have undermined that right). Further, the Court in *Cox Broadcasting* found the facts of that case to be within their fourth exception, which was stated as a situation where failure to review "might seriously erode *federal policy*". (Emphasis added.) 420 U.S. at 483. Thus, *Cox Broadcasting* expressly did not limit the fourth exception to cases threatening freedom of the press.

Returning to *Flynt v. Ohio*, ___ U.S. ___, 101 S. Ct. 1958, 68 L. Ed. 2d 989 (1981), the Court observed there that if it accepted jurisdiction under the fourth

exception to *Cox Broadcasting* the exception would swallow the rule. 101 S. Ct. at 1960. Petitioner Flynt had moved to dismiss the prosecution claiming selective and discriminatory prosecution in violation of the Equal Protection Clause. The trial court granted the motion but the Ohio Supreme Court reversed. This Court properly found that immediate review was not necessary to protect important federal interests. Flynt's claim of selective prosecution affected only his case. Additionally, once the prosecution was initiated Flynt faced no coercive dilemma threatening waiver of a constitutional right.

Appellants assert that this appeal is unique in that immediate review is necessary to protect against coercive waiver of the privilege against self-incrimination, certainly an important federal policy. If this Court declines review, the effect of the Florida Drug Trafficking Law will be to coerce cooperation and to abandon appellate remedies. This is the *only opportunity* Appellants will have to present the issue to this Court before confronting that coercive choice. If appellate review is delayed numerous other defendants will be similarly coerced. The teaching of *Albertson v. Subversive Activities Control Board, supra,* is that appellate review should not be deferred until after the coercive dilemma is posed, since to do so would threaten the interests the privilege is designed to protect. Finally, the Florida Drug Trafficking Law presents serious self-incrimination problems on the merits. The decision of the Florida Supreme Court is therefore sufficiently final for purposes of 28 U.S.C. § 1257(2).

If the Court takes jurisdiction as to the self-incrimination question, it may also consider other federal issues raised in the appeal. *Cox Broadcasting Corp. v. Cohn,*

420 U.S. 469, 487, footnote 14, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

[Section 893.135 of the Florida Statutes penalizes the possession or distribution of certain amounts of various controlled substances, including marijuana and cocaine. The statute is printed in its entirety in the appendix hereto. The subsection which is the subject of this appeal provides that the severe mandatory minimum sentences without parole may be reduced or suspended only as follows:]

Section 893.135(3) of the Florida Statutes (1979):

> The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

Fifth Amendment, United States Constitution:

> No person shall be . . . compelled in any criminal case to be a witness against himself . . . .

Fourteenth Amendment, United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Appellants were charged by information in the Circuit Court for Escambia County, Florida, with three felonies. The third count of the information alleged a violation of Section 893.135(1)(b)3 of the Florida Statutes (1979), known as the Florida Drug Trafficking Law, for possession of 400 grams or more of any mixture containing cocaine. The sentence for this offense is a mandatory minimum prison term of fifteen years without parole unless the accused renders substantial assistance in the prosecution of accomplices. Appellants moved to dismiss this count of the information on numerous state and federal grounds including those urged in this appeal. The trial court sustained the motion and entered an order declaring the statute unconstitutional, printed in the appendix hereto. The state appealed this order to the Florida Supreme Court which reversed the trial court on all grounds. The Florida Supreme Court held, *inter alia,* that the sentencing procedures of the Drug Trafficking Law did not violate the privilege against self-incrimination nor offend due process by permitting the prosecution to exercise the sentencing power.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

(1) Whether the Florida Drug Trafficking Law, which upon conviction imposes mandatory minimum sentences without parole, and which permits a sentence reduction only if the defendant "provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals", is unconstitutional as a violation of the Fifth Amendment privilege against self-incrimination.

Under subsection (3) of the Florida Drug Trafficking Law, a convicted defendant must receive a specified mandatory sentence without possibility of parole. The defendant may avoid such a sentence *only* by providing "substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." In such case, the mandatory sentence may be reduced or completely suspended. On the face of it, therefore, the law imposes long sentences as a coercive device to compel disclosures from the accused. Further, unlike decisions discussed *infra*, where refusal to cooperate with the prosecution was *one factor* in the judge's discretionary sentencing decision, here the *only factor* affecting length of sentence is the cooperation of the accused.

The Florida Supreme Court held that this sentencing scheme did not violate the privilege against self-incrimination. *State v. Benitez*, 395 So. 2d 514, 519-520 (Fla. 1981), reprinted in the appendix hereto.

The applicability of the privilege against self-incrimination in the sentencing context was recently before this

Court in *Roberts v. United States*, 445 U.S. 552, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980). In that case, the trial court stated at the imposition of sentence that it had considered the defendant's failure to cooperate with the prosecution. The Court held it was not improper, under generally accepted principles of sentencing, to consider lack of cooperation as bearing on the need for rehabilitation. The petitioner also claimed, for the first time on appeal, that judicial consideration of the lack of cooperation violated his privilege against self-incrimination. The Court responded that, "These arguments would have merited serious consideration if they had been presented properly to the sentencing judge." 445 U.S. at 559. The Court refused to consider the claim on that basis.

The recognition in *Roberts* that the self-incrimination claim would have merited serious consideration was based on supporting decisions in the federal courts of appeal. In *United States v. Garcia*, 544 F.2d 681, 684-686 (3d Cir. 1976), the Court squarely held that requiring defendants to cooperate in the identification and prosecution of accomplices violated the privilege. The Fifth Circuit has reached the same conclusion in a number of decisions. *United States v. Wright*, 533 F.2d 214, 215-217 (5th Cir. 1976); *United States v. Rogers*, 504 F.2d 1079, 1084-1085 (5th Cir. 1974); *United States v. Acosta*, 501 F.2d 1330, 1337-1338 (5th Cir. 1974), *dissenting opinion of Judge Gee, adopted en banc*, 509 F.2d 539 (5th Cir. 1975).[1]

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[1] *See also, United States v. Rodriguez*, 498 F.2d 302 (5th Cir. 1974); and *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966), finding a violation of the privilege against self-incrimination where the trial court sentenced more harshly because the accused refused to confess his guilt after conviction.

The Florida Supreme Court's decision in this case is in direct conflict with these decisions. Indeed, the sentencing structure of the Florida Drug Trafficking Law presents the self-incrimination issue in its most pure form since under its terms the disclosures of the accused are the only factors affecting sentencing lenity. In the above federal decisions, on the other hand, non-cooperation was just one factor in the whole complex of variables affecting the length of sentence.[2]

Second, if the privilege against self-incrimination applies in the sentencing context, then the Florida Supreme Court's decision is in direct conflict with a number of this Court's decisions determining the applicability and scope of the privilege. Just last term, and after the *Benitez* decision was handed down, this Court unequivocally held that the privilege applies at sentencing. *Estelle v. Smith*, ___ U.S. ___, 101 S. Ct. 1866, 1972-1873, 68 L. Ed. 2d 359 (1981). Given that holding, it remains to be determined whether the sentencing lenity promised by the Drug Trafficking Law is sufficiently compulsive and whether the required disclosures involve a sufficient risk of incrimination to invoke the privilege. The decisions of this Court are clear on both points.

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[2]The First and Second Circuits have held that the sentencing judge may state that he has taken into consideration the defendant's noncooperation so long as the judge gives consideration to all factors bearing on the need for rehabilitation and does not *punish* the accused for remaining silent. *United States v. Bradford*, 645 F.2d 115 (2d Cir. 1981); *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979); *United States v. Miller*, 589 F.2d 1117 (1st Cir. 1978). A contrary result was reached, however, where non-cooperation was the sole basis for enhanced punishment, *United States v. Ramos*, 572 F.2d 360 (2d Cir. 1978). Hence, the Florida Supreme Court's decision is also directly in conflict with this line of authority.

The compulsion of the Drug Trafficking Law is the imposition of mandatory sentences without parole of up to twenty-five years in prison.[3] If "substantial assistance" is rendered, however, such sentence may be reduced or totally suspended. These sentencing differentials are obviously compelling, and this Court has held that penalties of an economic nature significantly less coercive than incarcerative sentences were sufficient to trigger the privilege. *Lefkowitz v. Cunningham*, 431 U.S. 801, 97 S. Ct. 2132, 53 L. Ed. 2d 1 (1977), and decisions cited therein.

Nor can there be any question but that the disclosures compelled by the Drug Trafficking Law involve a sufficient risk of incrimination to invoke the privilege. The statute, for instance, requires the accused to identify accomplices and co-conspirators. This type of disclosure was held protected by the privilege in *Malloy v. Hogan*, 378 U.S. 1, 12-14, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), since the identified accomplice might have information incriminating the defendant in other crimes. Were this not sufficient, it is also clear that disclosures made to state officials without immunity could be the basis for federal prosecution, not only for drug violations under Title 21 of the United States Code, but also for related crimes such as the federal RICO offense, 18 U.S.C. §§ 1961-68. *Abbate v. United States*, 359 U.S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959). The possibility of incrimination under the laws of a separate sovereign is within the protection of the privilege.

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[3]Appellants are charged under Section 893.135(1)(b)(3) with possession of more than 400 grams of "any mixture containing cocaine". If convicted, they will receive a mandatory minimum prison term of fifteen years plus a $250,000 fine, unless they render "substantial assistance" to the prosecution.

Marchetti v. United States, 390 U.S. 39, 44-48, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968).

A final consideration affecting the substantial importance of the self-incrimination issue is that a number of other states have recently passed similar or identical legislation which uses the sentencing power to compel cooperation in the identification and prosecution of accomplices.[4] Only one other state court decision has been found discussing the constitutionality of such a statute, *People v. Eason*, 40 N.Y.2d 297, 386 N.Y.S.2d 673, 353 N.E.2d 587 (1976), and no self-incrimination argument was raised or discussed therein.[5] This emerging

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[4]Code of Alabama, § 20-2-81, enacted in 1980 [identical to Fla. Stat. § 893.135(3)]; Louisiana Revised Statutes, § 40:967 (G)(2), enacted in 1979 [virtually identical to Fla. Stat. § 893.135 (3), but no provision for in camera hearing]. New York Penal Law § 65.00(1)(b) is a similar coercive provision built into the general sentencing structure: "The court . . . may sentence a person to a period of probation upon conviction of a class A-III felony if the prosecutor . . . recommends the . . . sentence . . . upon the grounds that such person has or is providing material assistance." These provisions should be compared with two other recent enactments: Ohio Revised Code Annotated, § 3719.70(B) effective July 1, 1976: "When a person is convicted of any drug abuse offense, the court shall, in determining whether to suspend sentence or place the person on probation, take into consideration whether such person has truthfully revealed all information within his knowledge . . . such information shall include . . . the identity and whereabouts of accomplices, accessories, aiders, and abettors . . ."; General Statutes of North Carolina, § 90-95(h)(5) effective March 1, 1981: "The sentencing judge may . . . impose less than the applicable minimum prison term . . . when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest or conviction of . . . co-conspirators . . . if the sentencing judge enters in the record a finding that the person sentenced has rendered such substantial assistance."

[5]The long mandatory prison terms provided in the New York law were held not to violate the Cruel and Unusual Punishment Clause in *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978).

statutory pattern in other jurisdictions shows that the issues raised here present a novel and nationally important question of federal law which should be decided by this Court. This is especially true where the existence of such statutes undoubtedly operates on a daily basis to coerce disclosures which may be protected by the privilege against self-incrimination.

(2) Whether the Florida Drug Trafficking Law, which upon conviction requires the court to impose a mandatory minimum sentence without parole unless the state attorney, in his unreviewable discretion, moves for a sentence reduction, is unconstitutional as a violation of the due process clause of the Fourteenth Amendment.

Under subsection (3) of the Florida Drug Trafficking Law, the long mandatory sentences otherwise provided for in the act must be imposed *unless* the prosecutor moves the court for a sentencing reduction on the ground that "substantial assistance" has been rendered. Nothing in the law requires such a motion, however, and there is no provision for judicial review of the prosecutor's discretionary decision not to make the motion. The prosecutor therefore is vested with the discretionary power to withhold any sentencing reduction from the defendant, even if "substantial assistance" has in fact been rendered.

The Florida Supreme Court held in *State v. Benitez*, 395 So. 2d 514, 519 (Fla. 1981), that this provision did not unlawfully vest the sentencing power in the prosecution since "The ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence." The court

therefore found no constitutional objection in such a procedure. The court, perhaps intentionally, overlooked the statutory truth that the prosecution has no obligation to make such a motion and the decision to do so is totally within his discretion.[6]

This decision is in direct conflict with a number of decisions of this Court which establish that where a finding of fact must be made in the post-conviction context and where the finding affects a "liberty interest", due process requires at least the opportunity for a hearing before a *neutral* decision maker.

Morrissey v. Brewer, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), is the landmark decision. The Court there held a state procedure permitting revocation of parole without a hearing and solely on the written report of a parole officer to be a violation of due process. The Court first said that *Mempha v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967), established that sentencing was part of the criminal prosecution requiring the "full panoply of rights due a defendant." 408 U.S. at 480. Since subsection (3) of the Drug Trafficking Law is expressly part of the sentencing process, it is clear that "the full panoply of rights" should apply. Whatever those rights may be, however, it is further clear that any procedural rights required by *Morrissey* for a parole violation would *at a minimum* be required for sentencing. The Court then specified a number of constitutionally required procedures for the parole revocation decision including

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[6]The Florida Supreme Court's approach to this issue was expressly adopted from *People v. Eason*, 40 N.Y.2d 297, 301, 386 N.Y.S.2d 673, 676, 353 N.E.2d 587, 589 (1976), which in similar fashion overlooked the fact that sentencing reduction could be granted only upon prosecutorial recommendation.

the opportunity for a hearing before a neutral and detached hearing body. 408 U.S. at 489. The Court further held that even the preliminary decision to seek revocation should be made by "someone not directly involved in the case" and specifically disqualified the prisoner's parole officer since he would not have "complete objectivity". 408 U.S. at 485-486.

Morrissey v. Brewer has been followed and applied in numerous other post-conviction settings. *Vitek v. Jones,* 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980) (involuntary transfer of a prisoner to a mental hospital); *Wolff v. McDonnell,* 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (forfeiture of a "good time" for serious misbehavior); *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) (probation revocation). *See also, Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979), approving the procedures provided for a parole release decision and noting that somewhat less formality would be required where the decision was standardless, predictive of future behavior, and essentially intuitive, as opposed to a factual determination. *Accord: Connecticut Bd. of Pardons v. Dumschat,* 49 U.S.L.W. 4711 (U.S. S. Ct. 1981).

Certainly, the defendant's interest in eligibility for a substantially reduced or suspended sentence under the Drug Trafficking Law far exceeds the importance of the interests recognized in the above decisions. On the other hand, the state has no legitimate interest in denying the defendant at least the minimal protection of an opportunity to present evidence of "substantial assistance" to the trial judge.

Further, subsection (3) of the Drug Trafficking Law in effect establishes a post-conviction finding of fact, i.e., the rendering of "substantial assistance", which substantially ameliorates the sentence. In *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967), the Court struck down a Colorado statute providing for a *judicial* determination of the post-conviction fact that the defendant was a habitual sex offender, because the accused had no right to a hearing with the representation of counsel, no right to present evidence or confront the evidence against him, and no right to written findings providing for meaningful judicial review. Here, not only are no such rights provided, but the decision is in the first instance *vested in the prosecutor*, not a judge.

In sum, there is a significant body of law from this Court holding that a sentencing decision may not constitutionally be vested in the prosecution. Unfortunately, as described *supra* at footnote 4, both Alabama and Louisiana have enacted laws substantially identical to the Florida provision. The issue is therefore of growing national importance and should be decided by this Court.

CONCLUSION

For the above stated reasons, the questions presented in this appeal are so substantial as to require plenary consideration, and this Court should require briefs on the merits and oral argument.

Respectfully submitted,

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APPENDIX

APPENDIX A

SECTION 893.135
of the
Florida Statutes (1979)

893.135 Trafficking; mandatory sentences; suspension or reduction of sentences.–

(1) Except as authorized in this chapter or in chapter 500:

(a) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 100 pounds of cannabis is guilty of a felony of the first degree, which felony shall be known as "trafficking in cannabis." If the quantity of cannabis involved:

1. Is in excess of 100 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $25,000.

2. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $50,000.

3. Is 10,000 pounds or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $200,000.

(b) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine or of any mixture containing cocaine, as described in s. 893.03(2)(a), is guilty of a felony of the

first degree, which felony shall be known as "trafficking in cocaine." If the quantity involved:

1. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $100,000.

3. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

(c) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance, is guilty of a felony of the first degree, which felony shall be known as "trafficking in illegal drugs." If the quantity involved:

1. Is 4 grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 10 calendar years and to pay a fine of $100,000.

3. Is 28 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and to pay a fine of $500,000.

(2) Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section.

(3) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

APPENDIX B

OPINION
in
State v. Benitez, 395 So. 2d 514 (Fla. 1981)

ENGLAND, Justice.

This case comes to us on direct appeal from a trial court order determining that section 893.135, Florida Statutes (1979)—Florida's newly-enacted "drug trafficking" statute—is unconstitutional.

After Carlos and Esperanza Benitez attempted to sell one kilo of cocaine to undercover narcotics agents for $44,000, they were charged by information with "trafficking in cocaine" in violation of section 893.135. In ruling on motions to dismiss the charges, the trial court entered a lengthy order declaring section 893.135 to be facially invalid on a multiplicity of grounds. The state appeals that order, urging error in each of the trial court's rulings.

Section 893.135 is a unique response to a serious and growing concern of the legislature regarding illegal drug activities in the State of Florida. Subsection (1) of the new law establishes severe mandatory minimum sentences for trafficking in various types of illegal drugs. Subsection (2) prevents the trial court from suspending, deferring or withholding the adjudication of guilt or the imposition of sentence on a person convicted under the law, and it eliminates the defendant's eligibility for parole during the minimum mandatory sentence. Subsection (3) provides an "escape valve" from the statute's rigors, based on the initiative of the prosecuting attorney, by permitting the court to reduce or suspend a sentence if a convicted defendant is willing to cooperate with law

enforcement authorities in the detection or apprehension of others involved in drug trafficking.

Section 893.135 was enacted to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution, from the importer-organizer down to the "pusher" on the street. The harsh mandatory penalties of subsection (1), ameliorated by the prospect of leniency in subsection (3), were clearly calculated to provide a strong incentive for drug violators to cooperate with law enforcement authorities and become informers. No one argues that the elimination of illegal drug traffic is not a beneficial and worthwhile goal, or that the goals of this legislation are not meritorious.

Nonetheless, in their zeal to combat the flow and distribution of illegal drugs through this novel legislation, legislators knowingly glossed over alleged constitutional defects in the approach that was being developed. We in the judiciary do not have that luxury. Indeed, the trial judge's extensive and detailed order exhibits the multiple, serious difficulties which this statute poses under well-established constitutional principles. We discern six major challenges to the constitutionality of section 893.135, one directed at the mandatory penalties and five directed at the escape valve in subsection (3). The state also half-heartedly challenges the appellees' standing for the first time on this appeal. This last challenge being the easiest to treat, we discuss it first.

1. *Standing*

The basic rule governing the standing of parties challenging statutory enactments was recently stated in *Sandstrom v. Leader*, 370 So. 2d 3, 4 (Fla. 1979):

> Fundamental constitutional principles dictate that one may not challenge those portions of an enactment which do not adversely affect his personal or property rights. . . . Such a personal stake in the outcome of the controversy is necessary "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]" (citations omitted).

The state argues that, because appellees have not yet been convicted, they have no personal stake in this penalty-oriented statute.

To state the assertion is to demonstrate its absurdity. A party subject to criminal prosecution clearly has a sufficient personal stake in the penalty which the offense carries. This is wholly unlike cases in which criminal defendants have challenged portions of a statute which have nothing to do with their prosecution. *See State v. Millington*, 377 So. 2d 685 (Fla. 1979); *State v. Champe*, 373 So. 2d 874 (Fla. 1978).

2. *Cruel and Unusual Punishment*

Appellees argue that the mandatory minimum sentences of section 893.135(1) violate the cruel and unusual punishment clauses of the state[1] and federal[2] constitutions. Relying on various death penalty decisions of the United States Supreme Court,[3] they first contend

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[1]Art. 1, § 17, Fla. Const.

[2]U.S. Const. amend. VIII.

[3]*Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976).

that the mandatory minimum sentences unconstitutionally eliminate the exercise of discretion in sentencing. This argument was rejected by this Court in *McArthur v. State*, 351 So. 2d 972 (Fla. 1977), and warrants no further discussion here.

Appellees also argue that the mandatory sentences in section 893.135 constitute cruel and unusual punishment since they are unnecessarily severe and disproportional to the nature of the crime. This Court has consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks arguing cruel and unusual punishment. *See, e.g., McArthur v. State*, 351 So. 2d 972 (Fla. 1977); *Banks v. State*, 342 So. 2d 469 (Fla. 1976); *O'Donnell v. State*, 326 So. 2d 4 (Fla. 1975). The dominant theme which runs through these decisions is that the legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law. While it is often said that in an extreme case—wherein the sentence was *grossly* disproportionate to the severity of the crime—the legislature's judgment would run afoul of the constitutional prohibition, this Court has never addressed such a situation in the context of statutory sentencing minima.

The recent decision of the United States Supreme Court in *Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980), indicates that similar considerations prevail under the federal constitution. In that case, the Court held that a mandatory life sentence imposed on the petitioner pursuant to a Texas recidivist statute did not constitute cruel and unusual punishment under the eighth amendment. The majority's analysis of this area noted that:

> [t]his Court has on occasion stated that the Eighth Amendment prohibits imposition of a

> sentence which is grossly disproportionate to the severity of the crime. . . . In recent years this proposition has appeared most frequently in opinions dealing with the death penalty. . . . Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishment to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.
>
> Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.

Id., 445 U.S. at 271, 100 S. Ct. at 1138 (citations omitted). After analyzing one of these rare successful challenges, *Weems v. United States*, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1910), the majority concluded:

> Given the unique nature of the punishments considered in *Weems* and in the death-penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

Id., 445 U.S. at 273, 100 S. Ct. at 1139 (footnote omitted).

The penalties imposed by section 893.135 are certainly severe, but they are by no means cruel and unusual in light of their potential deterrent value and the seriousness of the crime involved. *See McArthur v. State*; *O'Donnell v. State*; *accord, People v. Broadie*, 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338, *cert. denied*, 423 U.S. 950, 96 S. Ct. 372, 46 L. Ed. 2d 287 (1975).

3. *Due Process-Vagueness*

Little discussion is needed concerning appellees' suggestion that subsection (3) is impermissibly vague in defining a convicted defendant who is eligible for lenient treatment as "any person . . . who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." Being a description of a *post-conviction* form of plea bargaining rather than a definition of the crime itself, the phrase "substantial assistance" can tolerate subjectivity to an extent which normally would be impermissible for penal statutes. *Cf. Linville v. State,* 359 So. 2d 450 (Fla. 1978) (statutory definition of proscribed activity held unconstitutionally vague). The contested phrase, in any event, is susceptible of common understanding in the context of the whole statute. *Schultz v. State,* 361 So. 2d 416 (Fla. 1978). There is no due process infirmity.

4. *Equal Protection*

Appellees' suggestion that subsection (3) denies equal protection of the law to convicted defendants who cannot provide "substantial assistance" to law enforcement officials is patently without merit. This legislation manifestly passes the rational basis test. *See Hamilton v. State,* 366 So. 2d 8 (Fla. 1978).

5. *Separation of Powers*

Two basic arguments by appellees are directed at Florida's constitutional separation of governmental powers. Art. II, § 3, Fla. Const. First, they assert that subsection (3) encroaches on the Court's rulemaking role, Art. V, § 2(a), Fla. Const., in that it conflicts with

Rule 3.800(b), Rule 3.720(b), and Rule 3.171 of the Florida Rules of Criminal Procedure. The statute differs from these rules, of course, but it in no way so conflicts with them as to offend the constitution.

Rule 3.800(b) permits the reduction of legal sentences, yet since it specifically excludes minimum mandatory sentences from its operation, its procedures obviously are not incompatible with section 893.135. Likewise, Rules 3.720(b) and 3.171 do not pose any obstacle to the operation of section 893.135. Rule 3.720(b) provides that at a sentencing hearing, the court shall "[e]ntertain submissions and evidence by the parties which are relevant to the sentence. . . ." Subsection (3) states that "[t]he arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any [motion for reduction or suspension of sentence]." The statute does not explicitly exclude the defendant from submitting evidence in his behalf, and it does not offend the statutory scheme to afford him that right. Finally, applicable procedural safeguards in Rule 3.171 can be afforded to defendants, to the extent they do not conflict with the explicit langauge of subsection (3). No infirmity of constitutional dimension attends the omission of those that do.

Appellees' second argument premised on the constitutional separation of powers is that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch, since the benefits of subsection (3) are triggered by the initiative of the state attorney. Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. "So long as a statute does not wrest from courts the *final* discretion to impose sentence, it does not infringe upon the consti-

tutional division of responsibilities." *People v. Eason*, 40 N.Y.2d 297, 301, 386 N.Y.S.2d 673, 676, 353 N.E.2d 587, 589 (1976) (emphasis in original) (rejecting a separation of powers attack on a similar provision in New York's drug laws).

6. *Self-incrimination*

Finally, the appellees argue that section 893.135 coerces a defendant into relinquishing his fifth amendment privilege against self-incrimination by denying him sentencing leniency unless he cooperates with the authorities. We reject this argument, primarily because it depends on unwarranted assumptions about the nature of the informer's disclosures. Nothing in the statute suggests that "substantial assistance" must incriminate the defendant of crimes other than those for which he has already been convicted (and for which no fifth amendment privilege is obviously necessary). We acknowledge the risk of prosecution in other jurisdictions. Nonetheless, a defendant need not invoke subsection (3), as nothing in the statute is compulsive. Putting a defendant to a difficult choice is not necessarily forbidden by the fifth amendment. *See, e.g., Corbitt v. New Jersey*, 439 U.S. 212, 218, 99 S. Ct. 492, 497, 58 L. Ed. 2d 466 (1978) ("[N]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." (footnote omitted)); *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978); *McGautha v. California*, 402 U.S. 183, 91 S. Ct. 1454, 28 L. Ed. 2d 711 (1971). No constitutional deprivation results if a defendant elects to reap the benefits of subsection (3).

With respect to those cases which say that the trial courts may not enhance a sentence based on a defend-

ant's failure to cooperate with the authorities, *see United States v. Garcia*, 544 F.2d 681 (3rd Cir. 1976); *United States v. Acosta*, 501 F.2d 1330 (5th Cir. 1974) (Gee, J., dissenting), *adopted en banc*, 509 F.2d 539 (5th Cir.), *cert. denied*, 423 U.S. 891, 96 S. Ct. 188, 46 L. Ed. 2d 122 (1975); *United States v. Rogers*, 504 F.2d 1079 (5th Cir. 1974), *cert. denied*, 422 U.S. 1042, 95 S. Ct. 2655, 45 L. Ed. 2d 693 (1975), we believe that *Roberts v. United States*, 445 U.S. 552, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980), went a long way toward resolving this issue against appellees. The Court in *Roberts* concluded that the district court properly considered the defendant's refusal to cooperate as one factor in imposing consecutive sentences. Admittedly, a fifth amendment claim was not properly raised in *Roberts* and "would have merited serious consideration" if it had been. *Id.* at 559, 100 S. Ct. at 1364. We conclude, however, that for fifth amendment purposes the situation in *Roberts* is distinguishable from that here. A sentence reduction obtained by a sentenced convict due to his cooperation is not tantamount to the enhancement of a sentence imposed on an unsentenced, but convicted defendant as a result of his lack of cooperation. The former is no different from a gratuitous sentence reduction offered to one already incarcerated who, even without statutory sanction, risks reincrimination in exchange for early release benefits.

Our disposition of appellees' challenges obviates the need to consider the severability of subsection (3) from the statute. We hold that section 893.135 is constitutional. The order of the trial court is reversed, and the case is remanded for further proceedings.

SUNDBERG, C.J., and ADKINS, BOYD, OVERTON, ALDERMAN and MCDONALD, JJ., concur.

APPENDIX C

OPINION
in
State v. Yu, 400 So. 2d 762 (Fla. 1981)

ALDERMAN, Judge.

These cases are before us on direct appeal to review orders of the trial courts granting the defendants' motions to dismiss and holding section 893.135, Florida Statutes (1979), unconstitutional. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution (1972).

We resolved all of the constitutional issues presented by these appeals, with the exception of one, in *State v. Benitez*, 395 So. 2d 514 (Fla. 1981), wherein we upheld the validity of section 893.135. We, however, did not address the issue of whether section 893.135(1)(b), prohibiting the sale or possession of "28 grams or more of cocaine or any mixture containing cocaine, as described in s. 893.03(2)(a)," violates the due process and equal protection provisions of the Florida and the federal constitutions.

In the appealed orders, the trial courts held that penalizing possession of a certain amount of "any mixture containing cocaine" without regard to the percentage of cocaine in the mixture is arbitrary, unreasonable, and a violation of due process and equal protection of the law. We disagree and uphold section 893.135 against these challenges.

We find convincing the rationale of the Supreme Court of Illinois in *People v. Mayberry*, 63 Ill. 2d 1, 345 N.E.2d 97, *cert. denied*, 429 U.S. 828, 97 S. Ct. 87, 50 L. Ed. 2d 92 (1976). Therein, defendants challenged

the Illinois cannabis control act and the controlled substances act which classified offenders by providing that an offense becomes more severe as the weight of the substance involved increases. The classifications of this act were not based upon the amount of pure cannabis or controlled substance involved but rather were based upon the amount of the substance containing the cannabis or controlled substance. Upholding this act, the Illinois Supreme Court, relying upon *United States ex rel. Daneff v. Henderson*, 501 F.2d 1180 (2d Cir. 1974), said:

> The court noted in *Daneff* that dangerous drugs are generally marketed in a diluted or impure state. It was therefore held that it was not unreasonable or irrational for a legislature to deal with the mixture or compound rather than the pure drug. The court went on to state that "[t]he State cannot be expected to make gradations and differentiations and draw distinctions and degrees so fine as to treat all law violators with the precision of a computer." (501 F.2d 1180, 1184). We find the reasoning of the court in *Daneff* persuasive. Our legislature may have believed that any given amount of drug can be distributed to a greater number of people and thus have a greater potential to be harmful if it is mixed with another substance. While the soundness of that belief may be questionable, the determination is one for the legislature to make, and we cannot find that the classification schemes at issue have no reasonable basis. Also, the defendants have not demonstrated that a classification scheme based upon the amount of the pure drug contained in a given substance would be feasible. We therefore conclude that the classification schemes are not unconstitutional merely because they are based on the amount of the "substance containing" the

> cannabis or controlled substance rather than upon the pure cannabis or controlled substance.

345 N.E.2d at 101.

In *Daneff*, defendant challenged a New York drug law on the basis that there was no rational basis for the statutory scheme which assessed punishment on possession of a quantity of "mixture" without regard to the actual quantity of the dangerous drug present in the mixture. Defendant argued that this sentencing scheme violated equal protection and due process of the law because it created unequal and irrational treatment of offenders guilty of what he contended were identical offenses. Under the New York law, possession of a given amount of pure cocaine and the possession of the same amount of cocaine mixed with various amounts of dilutent were viewed as different offenses, the latter carrying greater sanctions. The United States Court of Appeals, Second Circuit, held that there was a rational basis for the classifications drawn by the New York legislature, and therefore the statute in question did not violate either due process or equal protection of the laws. It held that defendant's argument in support of his claim that the statute was irrational proved too much and too little and explained:

> Too much, in the sense that, by accepting appellant's own premise that narcotics such as heroin and cocaine are generally marketed in mixtures or compounds, it does not seem unreasonable or irrational for a legislature to deal realistically with the marketing of the mixture or compound rather than the handling of the pure narcotic. Too little, in the sense that while it may not be wise to let the possessor of the pure or a purer product escape with a lighter penalty than that going to the possessor of the drug in its ordinary marketable form, it is not

> necessary for a legislature to attempt to eradicate all evil, but only part of it; as the Court said in *Pennsylvania v. Ashe*, 302 U.S. 51, 55, 58 S. Ct. 59, 60, 82 L. Ed. 43 (1937), "The comparative gravity of criminal offenses and whether their consequences are more or less injurious are matters for [the state's] determination."

501 F.2d at 1184. Recognizing that heroin and cocaine at least are generally marketed in a diluted or impure state, the court stated that the legislature's rationale for striking at the mixture or compound was evident.

We agree and find this rationale applicable to section 893.135(1)(b). The legislature has broad discretion in determining necessary measures for the protection of the public health, safety, and welfare, and we may not substitute our judgment for that of the legislature as to the wisdom or policy of a legislative act. *Hamilton v. State*, 366 So. 2d 8 (Fla. 1978). Section 893.135(1)(b) bears a reasonable relationship to the legitimate state objective of protection of the public health, safety, and welfare. The legislature reasonably could have concluded that a mixture containing cocaine could be distributed to a greater number of people than the same amount of undiluted cocaine and thus could pose a greater potential for harm to the public. This was within its prerogative to decide, and it has not been shown that such decision was irrational or unreasonable.

Accordingly, the orders of the trial courts are reversed on the authority of *State v. Benitez* and on the basis of our present holding that section 893.135(1)(b) is not arbitrary and unreasonable and does not violate due process and equal protection of the laws.

It is so ordered.

SUNDBERG, C.J., and ADKINS, BOYD, OVERTON, ENGLAND and MCDONALD, JJ., concur.

APPENDIX D

ORDER
of the
Circuit Court for Escambia County, Florida, declaring Section 893.135 of the Florida Statutes (1979) unconstitutional

IN THE
CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

Case No. 79-1839

STATE OF FLORIDA,
Plaintiff,

v.

JIM WALL, III, WILLIAM GREGORY WALL and DANNY RUSSELL,
Defendants.

ORDER DECLARING STATUTE UNCONSTITUTIONAL

THIS MATTER coming on to be heard upon the Defendants' Motion to dismiss Count I of the Information, the Court having heard from the parties and being otherwise fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED that Section 893.153 (3), Florida Statutes, is declared invalid and unconstitutional for the following reasons:

1. Said subsection violates the due process clause of Article I, Section 9, of the Constitution of the State of Florida, and the Fifth Amendment of the Constitution of the United States in that the language used therein is unconstitutionally vague, indefinite and uncertain, to-wit:

A. The Statute provides that the state attorney "may" move the sentencing court to reduce or suspend sentence without any standards or guidelines for the exercise of such discretion;

B. The state attorney's motion must be made only in conjunction with the defendant who provides "substantial assistance" in the investigation and prosecution of others.

2. According to the above-referenced subsection, the possibility of mitigation of the minimum, mandatory sentencing provisions are available only to defendants who have accomplices, accessories, co-conspirators or principals in the crime and only when the state attorney requires, and the defendant is capable of rendering "substantial assistance" in their identification, arrest and conviction, all in violation of Article I, Section 2, 4 and 9, of the Constitution of the State of Florida and the Fifth and Fourteenth Amendment of the Constitution of the United States.

3. Subsection (3) of 893.135, Florida Statutes, provides mandatory, minimum sentence without parole, or other mitigation unless the state attorney initiates a motion to reduce or suspend a sentence. Said provision violates basic constitutional principles of division and separation of the executive, legislative and judicial powers and responsibilities and effects an unwarranted encroachment into the judicial sentencing function by

delegating to the executive branch (the state attorney's office) the ultimate sentencing function which constitutionally must vest exclusively in the judicial branch. It further invades the court's inherent rule-making powers by purporting to prescribe who may petition the court and under what circumstances. Subsection (3) of 893.135, Florida Statutes, is, therefore, contrary to the guaranty of a republican form of government as decreed by Article II, Section 3, and Article V, Section 1, of the Constitution of the State of Florida.

4. Section 893.135(1)(b), Florida Statutes, prohibits sale or possession of a "mixture" of cocaine when combined with any other agent or substance regardless of the total amount of actual cocaine. Any chemically detectable amount of cocaine, when mixed with 28 grams or more of any substance, would fall within the purview of this Statute. There is no legislative history indicating nor has the court found any rational basis for defining cocaine as "any mixture containing cocaine" in that it was agreed by the state and the defendant that a quantitative analysis can be made to determine the actual amount of cocaine present in combination with any other substance. The Statute, thus, provides the identical treatment under the mandatory sentencing provision of persons possessing 28 grams of pure cocaine and those possessing a mere scintilla of cocaine mixed with 28 grams of any other substance. For this reason, the Statute offends the equal protection and due process clauses of the Constitutions of the United States and the State of Florida.

5. The Court has reviewed the various transcripts reflecting the legislative history of Section 893.135, Florida Statutes, and has determined that the legislature clearly did not intend for subsection (3) of Section

893.135, Florida Statutes, relating to relief for defendants that provide "substantial assistance" to be severable from the portions of the Statute imposing severe mandatory sentences. It is clear that the legislature intended for defendants convicted thereunder to seek the "substantial assistance" provision avoiding mandatory incarceration. If the "substantial assistance" provision is invalidated as being unconstitutional, the impact requiring every single defendant to be incarcerated for a mandatory, minimum of fifteen years would greatly exceed the anticipation of the legislature in passing a law. Accordingly, the Court finds that:

A. The Statute as a whole would not have been enacted without the inclusion of subsection (3);

B. Without the provisions contained in subsection (3), application of the Statute would create a result never contemplated by the legislature;

C. The provision of the act contained in subsection (3) was a clear and obvious inducement to the enactment of the other provisions of Section 893.135, Florida Statutes, specifically subsection (1) and (2) thereof.

6. The Court, therefore, finds that subsection (3) is not severable and that the unconstitutionality of that subsection invades and renders the entire Statute unconstitutional. Based upon all of the foregoing, the Court hereby grants the Defendants Motion to dismiss Count I of the Information and declares Section 893.135, Florida Statutes (1979), to be unconstitutional.

DONE AND ORDERED in Chambers at Pensacola, Escambia County, Florida, this 14th day of December, 1979.

/s/ William Frye, III
Circuit Judge

Copies to:

Barry Z. Rhodes, Esquire
Assistant State Attorney

Robert G. Kerrigan, Esquire
Attorney for Defendant

APPENDIX E

ORDER
of the
Florida Supreme Court denying Appellants' Petition for Rehearing

SUPREME COURT OF FLORIDA

Tuesday, July 28, 1981

Case No. 58,674

Circuit Court No. 79-1639 (C)
(Escambia)

STATE OF FLORIDA,
Appellant,

v.

JIM WALL, III, WILLIAM GREGORY WALL, and DANNY RUSSELL,
Appellees.

Upon consideration of the Petition for Rehearing filed in the above styled cause by the attorney for Appellees,

IT IS ORDERED that said Petition be and the same is hereby denied.

A True Copy
TEST:
Sid J. White
Clerk, Supreme Court
By: /s/ Tanya Carroll
Deputy Clerk

TC
cc: Hon. Ernie Lee Magaha, Clerk
Hon. William Frye, III, Judge
Robert G. Kerrigan, Esquire
Miguel A. Olivella, Jr., Esquire

APPENDIX F

NOTICE OF APPEAL
to the
United States Supreme Court

IN THE
SUPREME COURT OF FLORIDA

Case No. 58,674

Circuit Court No. 79-1639 (C)
(Escambia)

STATE OF FLORIDA,
Appellant,

v.

JIM WALL, III, WILLIAM GREGORY WALL, and DANNY RUSSELL,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Jim Wall, III, William Gregory Wall, and Danny Russell, Appellees in the above captioned case, hereby appeal to the United States Supreme Court from the final order of the Supreme Court of Florida reversing the order of the Circuit Court of Escambia County declaring Section 893.135 of the Florida Statutes (1979) unconstitutional. The final order of the Supreme Court of Florida denying Appel-

lees' Petition for Rehearing was rendered on Tuesday, July 28, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Robert G. Kerrigan
Kerrigan, Estess & Rankin
224 East Government Street
Pensacola, Florida 32501
(904) 432-2317
Attorneys for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Honorable Jim Smith, Attorney General, State of Florida, The Capitol, Tallahassee, Florida, by U.S. Mail on this 17th day of August, 1981.

/s/ Robert G. Kerrigan
Kerrigan, Estess & Rankin
224 East Government Street
Pensacola, Florida 32501
(904) 432-2317
Attorneys for Appellees